entered into by programmers that are not vertically integrated. As discussed above, the purpose of Section 628 is to prevent vertically integrated programmers from acting on their supposed incentives to favor affiliated cable operators and to discriminate against unaffiliated program distributors. To the extent that the differences in prices among contracts entered into by vertically integrated programmers are not significantly larger than the price differences in contracts of non-integrated programmers, such differences would not indicate the sort of discriminatory conduct that the Act sought to prevent and should be viewed as presumptively reasonable. In any event, some such zone of reasonableness would be a necessary and appropriate means of screening complaints that would be very unlikely to succeed.

### C. The Act Sets Forth The Standards And Criteria For Determining Whether A Difference In Price, Terms or Conditions Is Justifiable.

In addition to proposing a zone of presumptively reasonable price differentials, the Commission also asks whether any standards from other laws dealing with discriminatory pricing might be imported to help determine whether a particular differential is to be treated as unjustified and thus "unfair" under Section 628. But different laws have different purposes, and none of the price discrimination laws cited by the Commission share completely the objectives of Section 628. Moreover, Section 628 itself specifies criteria for determining whether differential prices, terms and conditions are justifiable, and these criteria are not the same as those that are used in applying the laws cited by the Commission.

1. Common Carrier Standards

Section 202 of the Commissions Act, for example, embodies the basic non-discrimination principles of common carrier law. But those principles are aimed at ensuring that the monopoly providers of essential facilities and services make those facilities and services available fairly to all potential users. Nothing in Section 628, however, contemplates imposing such common carrier obligations on cable programmers. Section 628 is aimed at a much narrower problem -- the supposed incentives and abilities of vertically integrated programmers to discriminate against unaffiliated multichannel distributors.

Unlike most regulated common carriers, cable programmers operate in a highly competitive marketplace. Requiring such programmers to deal on completely non-discriminatory terms with all potential buyers could, in some circumstances, prevent them from competing more effectively to market their products. Determining what sorts of differential prices, terms and conditions constitute unfair and unjustifiable conduct in the competitive video programming marketplace is quite different from determining what is unfair and unreasonable in the context of common carriage.

2. Robinson-Patman Standards

The antitrust laws, and in particular, the Robinson-Patman Act, prohibit certain types of price discrimination, and the Robinson-Patman Act includes statutory exceptions that are, in some cases, similar to the exceptions to the price discrimination prohibition set forth in Section 628. But its underlying purposes are not identical to those of Section 628 -- nor are the criteria for determining whether differentials are justifiable. Section 628 is meant to promote competition and to prevent anticompetitive conduct. The Robinson-Patman Act, by contrast, has distinctly protectionist origins and has, as many economists and antitrust experts have noted, often had the effect of limiting rather than promoting competition.[19/]

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19/ See, e.g., T. Calvani and G. Breidenbach, "An Introduction to the Robinson-Patman Act and Its Enforcement by the Government," 59 Antitrust L.J. 765, 770 (1991):

> While the legislative history of the Act speaks for itself, many scholars have written on the protectionist nature of the Robinson-Patman Act. Professor Herbert Hovenkamp, in his hornbook on economics and antitrust law, states that the Robinson-Patman Act cannot be understood as designed to encourage allocative efficiency or to maximize consumer welfare. It was designed to protect small businesses from larger, more efficient businesses. Professor Hovenkamp discusses the concern of Congress in 1936 with chain store growth. Likewise, Professor Hugh C. Hansen found that the Congress' immediate overriding concern in passing the Robinson-Patman Act was injury to the competitor victimized by the discrimination, and not injury to competition. He states that the Act is an antitrust statute in name only. The protectionist nature of the Act is also well-documented in an analysis of its

(Footnote continues on next page)

Like Section 628, the Robinson-Patman Act recognizes that price differences may, in some cases, be justifiable. But given its protectionist purposes, use of Robinson-Patman criteria to determine justified price differentiation is likely to lead to a more cramped and restrictive manner than is appropriate under Section 628. For example, Robinson-Patman and Section 628 both have provisions authorizing price differences that are cost-justified. But the language of those provisions is not identical, and the differences reflect the more permissive and less protectionist intent of Section 628.

Thus, to be cost-justified under the Robinson-Patman Act a price differential may "make <u>only due allowance</u> for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are ... sold or delivered."[20/] Section 628, on the other hand, requires only that differentials "<u>take into account</u> actual and reasonable

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(Footnote continued)

legislative history prepared by the Antitrust Section of the American Bar Association.

It is quite clear that the underlying predicate of the Robinson-Patman Act was <u>not</u> consumer welfare. Rather, the Act was protectionist legislation. The legislative history and subsequent scholarship overwhelmingly support this conclusion.... As Professor William F. Baxter observed during his tenure as Assistant Attorney General, the purpose of the statute is to put lead weights in the saddle bags of the fastest riders.

20/ 15 U.S.C. 13(a).

differences in the cost of creation, sale, delivery, or transmission of satellite cable programming or satellite broadcast programming."[21/]

Moreover, while the cost-justification defense of Robinson-Patman has been construed, in light of its protectionist purposes, to recognize only differences in the costs of the seller in manufacture, sale, and delivery, the legislative history of Section 628 makes clear that differential prices can also be justified, under the language of that provision, by differences in the buyers' costs of selling and delivering the programmer's product:

> Mr. KERRY ... Am I correct in understanding that as used in subsection 2(B)(ii) the cost of creation, sale, delivery or transmission of programming refers to costs incurred at the multichannel video programming distributor's level as well as at the program vendor's level?
>
> Mr. INOUYE ... That is correct.[22/]

The Robinson-Patman Act also has no provision that corresponds to Section 628's broad authorization of differentials that "take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor."[23/] The Robinson-Patman Act allows differences that

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21/ Section 628(c)(2)(B)(ii).

22/ Cong. Rec., S.16671 (Daily ed., Oct. 5, 1992) (emphasis added).

23/ Section 628(c)(B)(iii) (emphasis added).

reflect actual differences in <u>costs</u> resulting from "the differing ... quantities in which such commodities are to such purchasers sold or delivered."[24/] But, unlike Section 628, it does not also generally authorize volume discounts or other differentials based on the <u>economic benefits</u> to the seller of such discounts.[25/]

Nevertheless, the Robinson-Patman Act may, as we discuss below, provide useful guidance at the second step of the two-step analysis that is necessary in applying Section 628. Once it is determined that a particular difference in price, terms, or conditions is not justified and is "unfair," it is still necessary to determine whether that discrimination has prevented or significantly hindered a multichannel video programming distributor from providing programming to subscribers. In interpreting Robinson-Patman and whether, under that law, there has been the requisite prospect of <u>competitive injury</u>, the courts have identified some helpful criteria. But in determining whether particular differentials are <u>justified</u> under Section 628, Robinson-Patman precedents and standards are inappropriate.

In the end, the Commission's search for ready-made standards for making such determinations is likely to prove futile. Section 628 has its own unique purpose and sets forth its own

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24/ 15 U.S.C. Section 13(a).

25/ Such benefits might result, for example, from higher advertising rates attributable to serving a larger number of subscribers.

unique criteria for identifying justifiable and unjustifiable differentials. Those criteria, and the legislative history explaining them, provide the relevant guideposts. They make clear that consideration of the unique financial, technical and character-related aspects of particular distributors is justifiable. They make clear that differences in the programmer's cost of selling to different distributors -- and in the distributors' costs of providing service to subscribers -- can justify different prices, terms and conditions. And they make clear, as the Commission has noted,[26/] that volume discounts and other differential terms that are based on economic benefits attributable to the number of subscribers served by distributors are wholly permissible. Any further standards for applying those criteria and guideposts can only be developed on a case-by-case basis in complaint proceedings.

### D. Discrimination Is Prohibited Only If It Prevents Or Significantly Hinders The Provision Of Programming To Subscribers.

As discussed above, Section 628(c)(2)(B) establishes that not all price differentials constitute prohibited discrimination. Some differentials based on the different costs of the seller or the buyer, on the different number of subscribers served by different buyers, or on differences in credit worthiness, financial stability or other characteristics of different buyers are

26/ *See* Notice, para. 11.

justifiable. Prohibiting differential pricing in such circumstances would inhibit rather than promote competition and consumer welfare.

But even if a differential cannot be justified under one of the statutory criteria, it is not prohibited unless a multichannel distributor can also show that the discrimination prevents or significantly hinders it from providing programming to subscribers. Such showings can only be evaluated on a case-by-case basis. Nevertheless, it may be possible to identify in advance some useful indicators of whether such competitive harm is likely to exist.

1. Discrimination Must Be Between Competing Buyers In the Same Geographic Market.

The Robinson-Patman Act, like Section 628, requires that, as a prerequisite to establishing liability for price discrimination, an aggrieved buyer must make a showing of competitive injury. Robinson-Patman's competitive injury requirement is not identical to -- and is less rigorous than -- Section 238's. Under Robinson-Patman, "[p]laintiffs need not demonstrate that competition has, in fact, been adversely affected; only a 'reasonable possibility' or 'probability' of substantial competitive injury."[27/] But even such a 'reasonable possibility' of competitive injury

27/ ABA Antitrust Section, Antitrust Law Developments 413 (3d ed. 1992).

> requires proof of competition between the favored and disfavored purchasers ... [T]here cannot be competitive injury when the favored and disfavored purchasers operate in different geographic markets.[28/]

If even a reasonable possibility of competitive injury requires that the favored and disfavored buyers compete in the same geographic market, it follows -- and the Commission should make clear -- that prohibited discrimination under Section 628, which requires actual competitive harm, must involve two buyers that compete in the same market. There is no basis in Section 628 or in sound public policy for requiring uniform rates, terms, and conditions nationwide, even among entities that are in no sense competitors.

2. The Discrimination Must Affect The Retail Price to Subscribers.

Under the "reasonable possibility" test of the Robinson-Patman Act, courts have held that "a substantial price difference over a period of time involving a product for resale where competition among resellers is 'keen' creates an inference of injury to competition."[29/] No such inference is appropriate where, as in Section 628, the standard is actual injury and not the mere possibility of such injury. But the fact that even a reasonable

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28/ *Id.* at 415-16 (footnote omitted) (emphasis added).

29/ *Id.* at 416. *See*, *e.g.*, *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

possibility of injury will not be inferred unless competition among retailers of a product is "keen" is instructive.

This requirement of keen competition has been interpreted to mean that only where the discriminatory pricing is "between highly competitive customers operating with low profit margins"[30/] is there even a reasonable possibility of competitive injury. In other words, <u>if a price differential only reduces the disfavored buyer's profit margin, and eliminating the discrimination will not significantly reduce the retail price to consumers, the discrimination does not harm the disfavored customer's ability to compete</u>.

3. <u>Other Indicators Of No Competitive Harm</u>.

Although, under Robinson-Patman, courts have inferred a reasonable possibility of competitive injury where there is price distribution among highly competitive buyers, this inference is rebuttable. While no such inference is appropriate under Section 628, the established bases on which sellers have been able to rebut the inference of likely injury under Robinson-Patman ought also to be bases on which programmers, under Section 628, can show an absence of actual injury in the provision of programming to subscribers. These bases include:

> proof that disfavored customers have prospered, that the seller was only one of many competing sellers, that the discounts were merely introductory offers to new customers, that the price difference reflected consumer preference for

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30/ Antitrust Law Developments, <u>supra</u>, at 416.

> premium versus private label, and that restrictions on resale prices prevented any pass through of discriminatory discounts.[31/]

These showings are only illustrative of the sorts of evidence that will be relevant in establishing the requisite competitive injury under Section 628. Showing a mere possibility or probability of injury is not enough. The Commission should make clear that an essential element of a complaining multichannel distributor's case under Section 628 is an affirmative showing of harm -- a showing that discriminatory conduct has prevented or significantly hindered it from providing programming to subscribers.[32/]

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31/ Id. at 417

32/ In this regard, the Commission's proposal to establish penetration "benchmarks" that might establish a rebuttable presumption that a distributor has been harmed is misguided. Notice, para. 43 n.61. If a multichannel distributor's penetration were high, that would be an indication that any alleged anticompetitive conduct was not significantly hindering or preventing the distributor from providing programming to subscribers. But the converse is clearly not true. The fact that a distributor's penetration is low in no way indicates that the alleged anticompetitive conduct is preventing the distributor from providing service. Such low penetration may be attributable to any number of factors, and may have nothing to do with the price or terms in which it acquires programming.

In short, there is no basis for establishing a presumption, rebuttable or otherwise, in favor of a complainant on the basis of low penetration. It is the complainant's burden to demonstrate not only that it is not competing effectively but that its inability to provide service to subscribers is the result of unfair conduct prohibited by Section 628.

## E. The Price Discrimination Prohibition Should Operate Prospectively.

The Commission has tentatively concluded "that any pricing policies or restrictions developed to implement Section 628 should not be applied retroactively against existing contracts."[33/] This is the right conclusion. Indeed, any other approach would wreak havoc on the underpinnings of cable program distribution.

The fundamental starting point is that, to survive, a cable programming network -- like any business -- must ultimately recover its costs plus a reasonable profit. And, because the cable programming market is highly competitive,[34/] programmers are constrained from recovering more than costs plus a reasonable profit. A programmer's method of obtaining sufficient revenues to cover costs plus a reasonable profit will vary, depending upon whether it is permitted to charge different prices to different customers or must charge the same price to all customers. But while the left side of the equation may vary, the right side remains essentially constant. Total revenues equal total costs plus a reasonable profit.

It is not difficult to figure out what would happen to this equation if Section 628's prohibition of price discrimination

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33/ Notice, para. 27.

34/ There currently are more than 70 satellite cable programming networks. NCTA, Cable Television Developments (Oct. 1992).

meant that all customers of a program network were immediately entitled to the lowest rate currently charged to <u>any</u> customer. Revenues would fall -- indeed, if the differential between the highest price and the lowest price were large, revenues would fall sharply -- to a level that no longer covered operating expenses. If there is to be a single price for all customers, it obviously must be a price that is somewhere between the highest and lowest prices currently charged to customers. It cannot be the lowest price, because that price will be non-remunerative. And it cannot be the highest price, because, overall, such a price would not be competitive.

But the Commission has no authority under Section 628 to reform all contracts, raising the rates of the lowest paying customers and lowering the rates of the highest paying customers. Where the Commission upholds a complaint of price discrimination, it has 'the power to establish prices, terms, and conditions of sale of programming <u>to the aggrieved multichannel video programming distributor</u>."[35/] It has no power to alter the prices, terms and conditions of sale of programming to anyone else. Nor can the programmer unilaterally abrogate existing contracts and raise rates to a level that, if charged to all customers, would cover costs plus a reasonable profit.

<u>The only reasonable solution is to apply the price discrimination provisions of Section 628 prospectively and not</u>

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35/ Section 628(e)(1) (emphasis added).

against existing contracts. In other words, the terms of any contracts entered into by a programmer after the effective date of the Commission's rules must be non-discriminatory; differential prices, terms and conditions in such contracts will only be permissible if justified under the criteria of Section 628(c). This is the only way to implement a transition from differential to non-discriminatory pricing that does not force programmers to charge rates that, overall, are non-remunerative. Applying the provisions of Section 628 retroactively would, in the worst case, drive programmers out of business and, in the best case, sharply curtail growth and investment in more and better programming.

The Commission is concerned however, that

> [i]f we apply such policies prospectively only, waiting for existing contracts to expire, we may not achieve the results Congress envisioned from the requirements of Section 628 in a timely fashion given the long term nature of many programming agreements.[36/]

The Commission, therefore, asks whether it should, instead, phase in the price discrimination prohibition, establishing "a prospective deadline for compliance that will give parties to long-term programming contracts sufficient notice and time for renegotiation."[37/]

The problem with this approach is that, while it may give sufficient notice and time for renegotiation, there is no reason

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36/ Notice, para. 27

37/ Id.

to assume that cable operators with lower rates will agree to renegotiate for higher rates -- and there is no basis in the Act for compelling them to do so. A prospective deadline only delays the time at which programmers are forced to charge all customers a non-remunerative rate. Unless that deadline occurs after all existing contracts have expired -- in other words, unless the prohibition is applied only to new contracts -- the effects on programmers will be drastic and ultimately, confiscatory, in violation of the First and Fifth Amendments.

In any event, the Commission's concern about "the long-term nature of many programming agreements" may be illusory. There is no basis, at this point, for assuming that most existing contracts will not expire within a reasonably short period of time. Evidence submitted by programmers may indicate that most contacts are, in fact, short-term agreements. If most agreements do expire relatively soon, applying the prohibition prospectively will still achieve the results intended by Congress. As long as a programmer has a single low-priced contract that does not expire soon, however, applying the prohibition retroactively will have a serious adverse impact on that programmer.

### F. Buying Groups

Section 628(c)(2)(B) applies to discrimination not only among cable operators and other multichannel distributors but also among the "agents" and "buying groups" of such operators and distributors. The Commission asks whether it

> should require the cooperatives or associations who seek to exercise the benefits of the law through price discounts -- or other favorable considerations -- based on size to agree to unitary treatment for other relevant purposes, such as billing, uniform contract provisions, or joint and severed liability under a single program contract.[38/]

It would make sense for the Commission to impose requirements such as these before it determined that a buying group was entitled to the same price, terms and conditions as a cable operator or other distributor serving an equal number of subscribers. Section 628 does not, of course, provide that buying groups, can demand the same prices as other distributors, simply on the basis of the number of subscribers served. It only brings them within the class of buyers to whom the standards of Section 628 apply. But all the factors that justify differential prices, terms and conditions among the other distributors in that class also apply to buying groups. Moreover, mere price differences do not even constitute discrimination unless the price, terms and conditions, taken as a whole, are not comparable.

So, if the creditworthiness of the buying group or the technical quality of its members' service is not equivalent to that of a cable operator serving an equivalent number of subscribers, a higher price to the buying group would be justified. If the costs of selling to the buying group were

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38/ Notice, para 26.

higher as the result, for example, of separate billing and collection or higher transaction costs, then a higher price would be justified.

In sum, the Act provides that economic benefits and cost savings attributable to the number of subscribers served can justify volume discounts and other price differentials. But it does not provide that, where the number of subscribers served by different distributors is the same, those distributors must be offered the same price, terms and conditions, regardless of other differences among them.

## IV. EXCLUSIVE CONTRACTS

In addition to price discrimination, Section 628(c)(2) identifies exclusive contracts entered into by vertically integrated programmers as one of the practices that must, in certain circumstances, be specified by the Commission as "unfair conduct." As noted above with respect to price discrimination, the Commission's rules are to specify the form of conduct that are to be viewed as unfair and generally prohibited under Section 628(b). But to obtain relief in any particular case, distributors of multichannel video programming must demonstrate that, as a result of the unfair conduct, it has been prevented or significantly hindered from providing programming to subscribers. Therefore, a two-step analysis is again required in any complaint proceeding: (1) Is the exclusive contract a form of unfair conduct, under the criteria of Section 628(c)? (2) If so, has it prevented or significantly hindered the ability of any distributor to provide programming to subscribers?

Section 628(c) establishes different criteria for the first step of this analysis, depending upon whether the area of exclusivity extends to areas not served by any cable system or only covers areas served by a cable system.

A. Exclusivity In Areas Not Served By A Cable Operator

An exclusive contract that prevents a multichannel distributor from providing a vertically integrated programmer's programming in areas not served by any cable system is to be defined, without exception, as unfair conduct by the Commission. The Commission asks "whether the lack of reference to the public interest finding of Section 628(c)(4) for contracts in areas not served by a cable operator means that Section 628(c)(2)(C) makes exclusive contracts in such areas a *per se* violation."[39/] Exclusive contracts in such areas are not *per se* violations, because to violate the prohibition of Section 628, conduct must also inflict significant competitive injury on a multichannel distributor. But Section 628(c)(2)(C) does require that such contracts be viewed, without exception as *per se* "unfair" -- and unlawful *if* they inflict such competitive injury.

The Commission asks how, for purposes of this section, the "area served by a cable operator" is to be defined. The

39/ Notice, para. 28.

legislative history states that "[f]or purposes of this section, the conferees intend that an 'area served' by a cable system be defined as an area actually passed by a cable system and which can be connected for a standard connection fee."[40/] What this suggests is that exclusive contracts are _per se_ unfair only to the extent that they prevent distribution of particular programming to households that _cannot subscribe to cable television_. If cable television is available to a household, that household is within an "area served by cable," and it is not _per se_ unfair for a programmer to enter into exclusivity agreements that deny distributors the right to provide that programmer's service those households.[41/]

Thus, as the Commission states, "[t]he language in the Conference Report suggests that this should be a local market

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40/ Conference Report No. 102-862 at 93.

41/ The Conference Committee's suggestion that, to be in an "area served by cable," a household must be able to be connected to cable for a "standard connection fee" should not be construed to mean that, where, in order to cover the increase costs of installation, cable operators charge higher installation rates to subscribers in low-density areas or to subscribers who require a particularly long connecting cable or "drop," such subscribers should not be deemed to be in areas served by cable. If the cable operator is willing to provide service in an area at rates that are not prohibitively high, the area is served by cable, under any reasonable construction of that statutory term. The requirement of a "standard connection fee," to the extent that it is consistent with and explains the statutory language, means only that connections must be available at established rates and not on a special case basis, although those established "standard" rates may vary depending on density and other factors that effect the costs of providing service.

determination related to a particular cable system."42/ Contracts that grant exclusivity within the service area of a cable system are outside the scope of Section 628(c)(2)(C) and are only "unfair" if they are found by the Commission not to be in the "public interest" under Section 628)(c)(2)(D). Contracts that grant exclusivity outside that service area are within Section 628(c)(2)(C), and are deemed "unfair," without reference to the "public interest."

It is irrelevant that, as the Commission points out, "[a]lternative multichannel video program distributors ... may serve a somewhat different market than an individual cable operator."43/ It may be that the area in which an alternative distributor provides service encompasses some households that are within a cable operator's service area and some households that are not. But if an exclusive contract only prevents the multichannel distributor from providing a particular program network to subscribers in areas served by cable and does not limit distribution to households, in areas not served by cable, the agreement is subject to the "public interest" test of Section 628 (c)(2)(D) and not the "per se" test of Section 628(c)(2)(C)

Finally, the Commission notes that Section 628(c)(2)(C) is not limited to exclusive contracts but also applies to other "practices, understandings, arrangements and activities" that

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42/ Notice, para. 29.

43/ Id.

prevent a multichannel distributor from obtaining a particular program service in areas not served by cable. It asks whether such practices include various other requirements that may "restrict access to programming."[44/] For example, the Commission identifies requirements to renegotiate agreements once the distributor reaches a certain penetration level and "time-delay" requirements that allow distributors to show programming only after the programming has been shown by cable operators.[45/]

Section 628(c)(2)(C) does not apply to practices that "restrict" access to programming. It applies only to practices that "prevent" a multichannel video programming distributor from obtaining ... programming" from a vertically integrated programmer. Accordingly, renegotiation requirements, "time-delay" requirements and other such restrictions are beyond the scope of this provision.

### B. Exclusive Contracts In Areas Served By Cable

Exclusive contracts that only grant exclusivity in areas served by cable systems are subject to a much different standard than those that deny program access in areas not served by cable system. While the latter are always deemed unfair conduct and are prohibited wherever they significantly hinder a multichannel distributor from providing programming to subscribers, the former

44/ Notice, para. 31.

45/ Id.

are only deemed unfair if they are not determined by the Commission to be in "the public interest."

This is a significant distinction, because, as courts, economist and antitrust experts have increasingly recognized, most exclusive contracts promote rather than diminish competition and consumer welfare and, therefore, promote the public interest. Thus, the Supreme Court has held that, while exclusive contracts and other vertical non-price restraints may sometimes restrict "intrabrand" competition among retailers of a product in a particular geographic market, they also have "real potential to stimulate <u>interbrand</u> competition"[46/] -- i.e., competition among manufacturers or producers of the produce -- which is "the primary concern of antitrust law."[47/] As the Court noted,

> Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers.... For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.... The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called 'free ride' effect, these

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46/ <u>Business Electronics Corp. v. Sharp Electronics Corp.</u>, 485 U.S. 717, 724 (1988).

47/ <u>Continental T.V., Inc. v. GTE Sylvania Inc.</u>, 433 U.S. 36, 52 n.19 (1977).

> services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did.[48/]

In other words, exclusive arrangements between programmers and particular distributors can, by encouraging distributors to promote and provide high quality distribution of the programming, foster the development of more programming services and promote a competitive programming market. Moreover, to the extent that such a competitive programming market exists, any particular exclusive contract is unlikely to have a significant adverse effect even on intrabrand competition -- that is, on competition among distributors of programming. As the Supreme Court pointed out,

> [a]lthough intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited ... by the ability of consumers to ... purchase the competing products of other manufacturers.[49/]

Thus, only if the programming marketplace were itself highly concentrated -- if there were only one or two satellite program networks -- or if a single cable operator or other distributor locked up exclusive arrangements with most of the available program services, might there be an adverse effect on any particular competitor, much less on competition, at the retail distribution level:

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48/ Id. at 55.

49/ Id. at 54.

> It makes ... sense to inquire whether there is any reason to believe, in the context of a particular market, that the interests of the manufacturer that imposes a vertical restraint diverge from consumers' interest in efficient distribution. The answer will usually be no. Such a divergence of interest may, but by no means must, occur in the relatively rare case where the manufacturer faces little or no competition in the market.[50/]

Congress recognized the likely pro-competitive benefits of exclusive programming contracts and, in Section 628(c)(4), required the Commission to take such benefits into account in determining whether a particular contract was in the public interest. The Commission, for example, is required to consider the effect of the exclusive contract on "the development of competition in local and national distribution markets."[51/] This would include, of course, any beneficial effects on "interbrand" competition among satellite programming networks at the national level as well as any potentially adverse effect on competition among multichannel distributors at the local level.

Specifically, the Commission is required to consider the potentially beneficial effects of an exclusive contract on "the attraction of capital investment in the production and distribution of new satellite cable programming"[52/] and on

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50/ D. Ginsburg, "Vertical Restraints: De Facto Legality Under the Rule of Reason," 60 Antitrust L.J. 67, 69 (emphasis added) (footnotes omitted).

51/ Section 628(c)(4)(A).

52/ Section 628(c)(4)(C). The Commission notes that

(Footnote continues on next page)

"diversity of programming in the multichannel video programming distribution market."[53/] And it is to consider the potentially adverse effects of such a contract on "competition from multichannel video programming distribution technologies other

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(Footnote continued)

> it may be in the public interest to define, at the outset, a rule that would pemit exclusive distribution contracts for new program services. Such contracts could be deemed to meet the public interest test of Section 628(c)(4) if they were limited to a specific duration, e.g., two years, that would facilitate the launch of the new service.

Notice, para. 36. A rule allowing exclusivity for new services is wholly justifiable. Given the likelihood that exclusivity granted by a new service will have the pro-competitive benefit of facilitating the survival of additional programming in the video marketplace and the unlikelihood that exclusive rights to a new network will seriously injure competing multichannel distributors, deciding in advance that such exclusive contracts are in the public interest makes sense. The notion that the rule should be limited to contracts of less than two years' duration, however, makes much less sense. Two years of exclusivity is hardly enough to provide an incentive to invest in the carriage of a fledgling service. It gives cable operators exclusivity during the years when the service is just getting started but provides no promise of the right to carry the service exclusively in later years, when the service has become more attractive to subscribers. It makes more sense to adopt a rule that freely permits program services to enter into exclusive contracts of any duration -- or, at least, up to ten years -- during the first two years of their existence. Exclusive contracts entered into after a service has been operating for two years would no longer be automatically deemed in the public interest but would be subject to the public interest standard in complaint proceedings, on a case-by-case basis.

53/ Section 628(c)(4)(D).